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In the

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, et al.,
Respondents,

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners, Roy Romer and the State of Colorado. All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the area of group-based preferences and fundamental rights will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases involving group preferences before this Court including *Adarand v. Pena*, Supreme Court Docket No. 93-1841, *United States v. Hays*, Supreme Court Docket Nos. 94-558 and 94-627, and *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

PLF believes that group-based special preferences, while originally intended as temporary measures to assist historically disadvantaged individuals to regain the ability to partake in the full opportunities of American society, have degenerated into an apparently unstoppable parade of self-proclaimed "victims" claiming special rights over and above those fundamental rights granted to every person under the United States Constitution. The People of Colorado opted to stem this tide, only to be thwarted by the state Supreme Court's creation of a new "fundamental right" which ultimately ensures that remedial programs are never-ending and that states are unable to define the parameters of special preferences within their own state constitutions.

For the reasons stated herein, the decision of the Supreme Court of the State of Colorado should be reversed.

STATEMENT OF THE CASE

In 1992, the People of Colorado amended their constitution as follows:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. Art. II, § 30b. The initiative, popularly called "Amendment 2," passed with 53.4% of the vote. *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994) (*Evans II*). Shortly after passage, various individuals and municipalities (including Denver, Boulder, and Aspen) sued to enjoin the amendment, arguing that it was unconstitutional. The lawsuit reached the Colorado Supreme Court twice: once to affirm the trial court's preliminary injunction (*Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*)), and once to affirm the permanent injunction (*Evans II*, 882 P.2d 1335). *Evans II* adopted and reaffirmed *Evans I*. *Evans II*, 882 P.2d at 1341.

The Colorado Supreme Court determined that Amendment 2 not only repealed existing special protections for homosexuals and bisexuals, but also prohibited "any governmental entity from adopting similar, or more

protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Evans I*, 854 P.2d at 1285. The court then found that Amendment 2 infringed upon the "fundamental right to participate equally in the political process" of "an independently identifiable group of persons" *Evans II*, 882 P.2d at 1339 (quoting *Evans I*, 854 P.2d at 1282). The essence of this "fundamental right" was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." *Evans I*, 854 P.2d at 1279. The court concluded that the "right" was infringed by Amendment 2 because (1) "[p]rior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation," *id.* at 1286, and (2) Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at 1285. That is, no matter how hard the advocates lobbied their municipal government to outlaw discrimination on the basis of sexual orientation, the state constitution forbids the enactment of any such ordinance.

The trial court rejected the plaintiffs' contention that homosexuals and bisexuals are a suspect or quasi-suspect class (because they are not politically powerless) and that ruling was not appealed to the state Supreme Court. *Evans II*, 882 P.2d at 1341 n.3. One justice dissented from the state court decision. Justice Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally mandated group-based fundamental right. He noted that "judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to

prevent--the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals." *Id.* at 1356 (Erickson, J., dissenting).

SUMMARY OF ARGUMENT

The Colorado Supreme Court erred in its creation of a group-based "fundamental right" by which any "independently identifiable group" must be permitted to "participate equally in the political process." Because fundamental rights are reviewed under strict scrutiny, they should not be created at the whim of a court. On the contrary, the discovery of a fundamental right must be drawn (either explicitly or implicitly) from the text of the Constitution to be legitimate. The new "fundamental right" created below is a vaguely worded promise of future litigation by every group dissatisfied by electoral results.

Moreover, the new "fundamental right" would hamstring state legislatures and citizens (in initiative states) from declaring statewide policy on *any* issue. The breadth of the "fundamental right" would destroy the entire state preemption doctrine. In this case, Colorado has made a deliberate policy choice to favor individual rights over group rights and integration over separatism. Given the nature of the practical problems inherent in group-based preferences, the state constitutional amendment limiting such preferences was certainly rational and is constitutional. For the reasons set forth below, the decision of the Colorado Supreme Court should be reversed.

ARGUMENT

I

FUNDAMENTAL RIGHTS ARE INDIVIDUAL RIGHTS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction

the equal protection of the laws." The "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Richmond v. J. A. Croson Company*, 488 U.S. at 493. The Constitution does not allocate constitutional rights to be distributed like block grants within discrete groups who share some personal characteristic. Constitutional rights are *individual* rights.

> [D]emocracy is not based on the premise of equal endowments, but of equal rights. It does not guarantee success, but it does aspire to equal opportunity. This opportunity is extended not to groups as such, but to individuals, because democracy respects the moral integrity of the human person, whose rights may not be casually subordinated to collective interests.

D. D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* at 250 (1991).

The Court's constant recognition of fundamental rights as individual rights is so oft-stated, that only a few examples will suffice to make the point here. In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983), this Court explicitly held that the Constitution must treat citizens as *individuals*, not "'as simply components of a racial, religious, sexual, or national class.'" Moreover, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), the Court identified in the Due Process Clause of the Fourteenth Amendment a fundamental *individual* right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, 431 U.S. 678, 688-89 (1977).

Thus, the proper application of the Equal Protection Clause "restrains those who would use the coercive power of government to redistribute rights and opportunities and thereby serves its intended function as a mighty bulwark for *individual* liberty." Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137, 139 (1991) (emphasis added).

A. Because Some Fundamental Rights Have Been Acknowledged Which Are Not Expressly Found in the Constitution, Courts Must Take Special Care Not to Invent Illegitimate Rights

1. This Court Has Approached with Caution Invitations to Discover New Fundamental Rights

To assure both the public and the lower courts that announcing rights not readily explicitly identified in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the states and the federal government, this Court has sought to identify the nature of the rights deemed fundamental, which then qualify for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), this category was held to include those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." This description was expanded in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), which characterized as fundamental those liberties that are "deeply rooted in this Nation's history and tradition." *See also Griswold*, 381 U.S. at 506; *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). Most cases involving fundamental rights are decided in the context of the Due Process Clause of the Fourteenth Amendment. Nonetheless, the analysis is equally applicable to fundamental rights analysis under the Equal Protection Clause of the same amendment. *Moore*, 431 U.S. at 503 n.10 (citing *San Antonio Independent School District v.*

Rodriguez, 411 U.S. 1, 33-34, *reh'g denied*, 411 U.S. 959 (1973)).

The basic principles of the Constitution are federalism and democracy--that is, decentralized, representative self-government. The existence of "open ended" constitutional provisions, blank checks for judicial policy making would be inconsistent with these principles. Graglia, *The "Open-Ended" Clauses of the Constitution*, 11 HARV. J.L. AND PUB. POL'Y 87, 88 (1988). The Court took a similar view in *Bowers*, 478 U.S. at 194-95, when it was presented with the opportunity to discover a fundamental right to homosexual sodomy:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. ... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Later, in *Michael H. v. Gerald D.*, 491 U.S. 110, *reh'g denied*, 492 U.S. 937 (1989), *and* 499 U.S. 984 (1991), (state statutory presumption that husband of child's mother is child's father held not to violate unwed putative father's rights under Due Process Clause of Fourteenth Amendment), the Court again counseled caution when venturing into the area of fundamental rights which have not yet been acknowledged:

> "Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as in the

> anticipation of the Framers ..., the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

Michael H., 491 U.S. at 122 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

Recognizing the ramifications of discovering a new fundamental right, in *Michael H.*, 491 U.S. at 127 n.6, Justice Scalia argued that the test to determine whether a right is fundamental (and thus protected), courts should focus on the most specific level of tradition that can be identified. This would ensure that the Court's decision, if it were to create a new right, would be narrowly construed. The Colorado Supreme Court, unfortunately, took the opposite tack, and produced a tremendously broad right that will, if upheld, apply to many more situations than that produced by Amendment 2. The decision of the court below seems particularly nonchalant about casting off this Court's fundamental rights jurisprudence. The decision below could not possibly be justified under this Court's statement that fundamental rights must include as an element that it be an interest traditionally protected by our society. The purpose of this component of the Due Process Clause is "to prevent future generations from lightly casting aside important traditional values--not to enable this Court to invent new ones." *Michael H.*, 491 U.S. at 122 and n.2. In this case, the Colorado Supreme Court specifically ventured where this Court urged it not to tread. The People of Colorado made a policy judgment as to the extent their antidiscrimination laws would protect nonsuspect classes and the court preempted it without express constitutional authority.

2. Courts Have Refused to Discover Fundamental Rights Which Cannot Be Connected to Guarantees Existing in the Constitution and/or Long-Standing Tradition

This Court, as well as others, has refused to create new fundamental rights which cannot be squared with the principles set forth above. For example, in *Bowers v. Hardwick*, 478 U.S. at 190, the Court refused to announce that the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. *See also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (refusal to find fundamental right to shelter in federal Constitution).

Duncan v. Louisiana, 391 U.S. 145, 148-49, *reh'g denied*, 392 U.S. 947 (1968), is an example of the numerous cases which have found "fundamental rights" in the Fourteenth Amendment--but rights which were specifically incorporated from rights guaranteed in the Bill of Rights. In *Duncan*, the Court recounted the various tests for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment: (1) whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; (2) whether it is based on our system of jurisprudence; and (3) whether it is a fundamental right, essential to a fair trial. The Court concluded that trial by jury in criminal cases is "fundamental to the American scheme of justice," and therefore held that the Fourteenth Amendment incorporates the Sixth Amendment guarantee to the states. Unlike the court below, these cases did not create fundamental rights out of whole cloth. Numerous express rights acknowledged in the bill of rights, and applying originally only to Congress, have been "incorporated" into the Fourteenth Amendment and thus applied to the states. For examples of cases involving

incorporated rights, *see, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying Eighth Amendment cruel and unusual punishment analysis to state action); *Tennessee v. Garner*, 471 U.S. 1 (1985) (applying Fourth Amendment seizure analysis to state action); *Marsh v. Chambers*, 463 U.S. 783 (1983) (applying First Amendment Establishment Clause analysis to state action).

Some lower courts have taken heed of the required caution. For example, even though fundamental rights of procreation (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)) and childrearing (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) have been recognized by this Court, the Fifth Circuit declined to discover a fundamental right to adopt a child.

> When does the "fundamental right to adopt" overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties--birth parents, child, adoptive parents--when legitimating adoptions.

Griffith v. Johnston, 899 F.2d 1427, 1437 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

Failure to be cautious usually leads to problems. The creation of new fundamental rights often leads to decisions which may not have been foreseen by the court discovering the new right but which logically follows from the discovery nonetheless. For example, the fundamental "right to die" has been the subject of a number of court decisions. *See, e.g., In the Matter of Karen Quinlen*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *Cruzan v. Director, Missouri Department of Health*,

497 U.S. 261, 277 (1990). Some courts have advanced some radical claims about the "right to die," and then extrapolated from that right, the right of people to end the lives of their relatives when they become burdensome. *See In re Jobes*, 108 N.J. 394, 408, 529 A.2d 434, 441 (1987) (cutting off treatment for a conscious patient who was able to respond to directions and lift her head because trial court concluded that she was in "a persistent vegetative state").

The combination of mandated caution when approaching fundamental rights and the empirical evidence of expansion of such rights beyond their original boundaries in virtually all instances should have prompted the Colorado Supreme Court to recognize that the issues involved in Amendment 2 did not involve a suspect class, and did not involve any recognizable fundamental right. Its error, if not corrected, could have lasting impact on the state's ability to set statewide policies.

B. The Newly Discovered Right of an Independently Identifiable Group to Participate Equally in the Political Process Expands the Concept of Fundamental Rights Beyond All Reason

The Colorado Supreme Court has given this case a rather bizarre twist. What began as a challenge to Amendment 2 on behalf of homosexuals and bisexuals is now concerned with an entirely different group of people. The suit was originally brought to argue that sexual orientation was a characteristic entitled to a special group status for all individuals who have that characteristic. The challenges to Amendment 2 spent considerable effort arguing that the historical and continuing societal views toward homosexuality and bisexuality warranted a special preference--the right to sue under discrimination laws as a protected class equal in statute to race, religion, and gender.

The Colorado Supreme Court was asked to decide the merits of a lawsuit in which a group identified as gay men, lesbians, and bisexuals asserted their interest in the ability to file nondiscrimination suits as a protected class. After the Colorado Supreme Court's decision, however, it is an entirely different group claiming an entirely different interest which is the subject of this Court's review. The new group is the coalition of those individuals (regardless of sexual orientation) who opposed a statewide initiative. This coalition may now assert as interest to participate equally in the political process. The court below, however, assumes that the second group is identical to the first. *Evans I*, 854 P.2d at 1285-86; *Evans II*, 882 P.2d at 1339. The reason for this erroneous assumption can be explained only be the court's result. When the court below recognized that this Court already decided that homosexual activity is not a fundamental right (*Evans II*, 882 P.2d at 1341), thus implicitly holding that homosexuals are not a class worthy of special protections above and beyond those held by all Americans, it created the first group-based fundamental right: for an independently identifiable group to participate equally in the political process.

This creation could well be on par with Frankenstein's monster. Fundamental rights are often subject to varying and expansive interpretations, even when they appear straightforward on their face. For example, the right to travel involves far more than border guards or border taxes barring entry to a state. This Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), extended the right to travel to strike down durational residency requirements to receive welfare benefits and nonemergency medical care. The implications of the vaguely worded new "fundamental right" constructed by the Colorado Supreme Court are staggering. It is easy to imagine the future litigation attempting to decipher what it means for an "independently

identifiable group to participate equally in the political process."

For example: What does "independently identifiable" mean? Who does the identification? Must the group be registered with the state? Must a court make the identification? Will the state legislature have to create a statutory list of approved groups? Does simple press coverage of a gathering of people make an identification?

Moreover, what level of support among individuals creates a "group"? Two persons? 20? 100? 10,000?

What does it mean "to participate"? To vote in an election? To sponsor an initiative? To campaign for a candidate or initiative? To be successful in pursuing a position? What does "equally" mean? Compared to what?

Finally, what is the "political process"? Voting? Lobbying? Sponsoring an initiative? Campaigning? Running for office?

Given the uncertainty inherent in every material term describing this "fundamental right," courts as well as citizens would have no idea how or when to invoke the right or how it should be adjudicated. The Colorado Supreme Court appears to have used a results-oriented approach to discover a fundamental right of its own design, thus creating a reason to apply strict scrutiny.

This new "fundamental right," particularly as relates to "equal political participation," would utterly destroy the ability of a state to declare an issue of statewide concern, thus preempting local legislation on the subject. In essence, the Colorado court would find that "equal political participation" is denied if a group cannot successfully lobby a local government to do what the Constitution forbids. Yet that is precisely the point of a constitution--to define and limit legislative power. Imagine this "right" applied to the federal Constitution: The First Amendment interferes with the right of religious groups to lobby their school boards for school prayer. *See Engel v. Vitale*, 370 U.S. 421 (1962). That amendment also interferes with the right of veteran's groups to "participate equally in the political process" because they cannot lobby for local ordinances prohibiting desecration of the American Flag. *See Texas v. Johnson*, 491 U.S. 397 (1989).

Not all political activity on any given issue is constitutionally proscribed, however. While the political process cannot be used to subvert a constitution, it can be used to *amend* that constitution. Amendment 2 in no way prevents any group from seeking an amendment to the Colorado Constitution to alter the terms of Amendment 2 (or any other provision). In short, Amendment 2 does not restrain political participation in the political process; instead, it is the result of such participation by the voters of Colorado.

The new "fundamental right" attributed to any independently identifiable group to participate equally in the political process cannot plausibly be restricted to the type of case at bar. This Court must remind the lower courts that careless use of words, especially where fundamental rights are concerned, will without question open the floodgates to additional claims:

> Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Snyder v. Massachusetts, 291 U.S. 97, 114 (1934), *overruled on other grounds in Duncan v. Louisiana*, 391 U.S. 145

(1968). For these reasons, this Court should reverse the decision of the Colorado Supreme Court.

II

SOCIETY MUST BE ABLE TO DRAW THE LINE ON ANTIDISCRIMINATION STATUTES WHICH INEVITABLY LEAD TO GROUP-BASED PREFERENCES

> Instead of a transformative nation with an identity all its own, America increasingly sees itself as preservative of old identities. Instead of a nation composed of individuals making their own free choices, America increasingly sees itself as composed of groups more or less indelible in their ethnic character. The national idea had once been *e pluribus unum*. Are we now to belittle the *unum* and glorify *pluribus*? Will the center hold? or will the melting pot yield to the Tower of Babel?

Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* at 2 (Whittle Communications, Knoxville, 1991), *cited in* Rose, *"Of Every Hue and Caste": Race, Immigration, and Perceptions of Pluralism*, 530 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 187, 200 (1993).

The civil rights struggle of the 1950s and 1960s secured the political rights and basic opportunities necessary for black Americans to fully enjoy the fruits of citizenship. Since then, however, the civil rights "movement" has been transformed into an establishment dedicated to perpetuating itself and expanding its power. The traditional civil rights movement derived its moral legitimacy from the universality of the rights it sought to establish. The modern civil rights establishment has abandoned this moral claim by transforming the meaning of civil rights from those fundamental rights all Americans share equally into special benefits for some and burdens for others. Bolick, *In Whose Name? The Civil Rights Establishment Today* at 7-8 (D.C., Capitol Research Center 1988), *quoted in* J. Conti and B. Stetson, *Challenging the Civil Rights Establishment: Profiles of a New Black Vanguard* at 5 (Praeger Press, Westport, 1993).

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

T. Sowell, *Civil Rights: Rhetoric or Reality*? (Rhetoric or Reality) at 109 (William Morrow & Co., N.Y., 1984). Just as the original goal of civil rights legislation--to provide equal opportunity to all Americans--has degenerated into quotas and "goals," there is no reason to believe that new politically active groups who choose to identify themselves in some manner will not also seek to parlay nondiscrimination into affirmative duties.

In this section of its brief, amicus addresses the broader issue of how a political body--a state--may, within constitutional bounds, limit the extent to which various groups are entitled to special privileges. Moreover, amicus argues that group-based privileges *should* be limited to the greatest extent possible and that this Court should not introduce new federal causes of action that would prevent states from making policy decisions based on individual rights.

A. Group-Based Preferences, Even to Remedy Past Discrimination, Must Be Temporary

This Court has recognized that the American tradition values individual rights over group rights. For example,

because group-based preferences necessarily infringe upon the individual rights of those who do not belong to the group, such preferences must be temporary. This Court has held that "benign" discrimination may occur only to remedy past discrimination (*Richmond v. J. A. Croson Co.*, 488 U.S. 469), so, as explained below, that once the remedy has been implemented, there is no constitutional requirement to use discrimination to *maintain* what has been achieved.

1. This Court's Decisions Hold That Remedial Affirmative Action Programs Must Be Temporary

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court held a constitutional affirmative action plan must, *inter alia*, be temporary. *Id.* at 208. This holding has been reaffirmed both by this Court and by many lower courts. For example, in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421, 479 (1986), the Court held that a court order to end union discrimination, the "'[p]referential selection of [union members] will end as soon as the percentage of [minority union members] approximates the percentage of [minorities] in the local labor force.'" (Quoting *Weber*, 443 U.S. at 208-09.) This Court, relying on *Weber*, held that court order operated "'as a temporary tool for remedying past discrimination without attempting to "maintain" a previously achieved balance.'" *Id.* (citing *Weber*, 443 U.S. at 216 (Blackmun, J., concurring)).

The emphasis on keeping preferential treatment temporary was reiterated in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In that case, the county promoted a female employee over a male employee to the job of road dispatcher pursuant to the county's affirmative action plan. This Court approved the open-ended plan in that case because the county used a "flexible, case-by-case approach" which expected only "gradual increases in the representation of minorities and women." *Id.* at 639. The Court cautioned, however, that

> [e]xpress assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. ... This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain ... balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the underrepresentation of minorities and women.

Id. at 639-40. The Court concluded that given the "Agency's express commitment to 'attain' a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance." *Id.* at 640.

Similarly, in *Local No. 93, International Association of Firefighters v. Cleveland*, 478 U.S. 501 (1986), an association of minority firefighters sued on a discrimination claim against the city regarding their lack of promotions. The Court held that the validity of race-based remedies must be consistent with *Weber*. Justice O'Connor, in a concurring opinion, noted specifically that "'prior discriminatory conduct' is the necessary 'predicate for a *temporary* remedy.'" *Id.* at 531 (O'Connor, J., concurring) (emphasis added). *See also Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

This Court has commented on restrictions of special preferences. For example, reverse discrimination is not justified by societal discrimination, which Justice Powell described as "an amorphous concept of injury that may be ageless in its reach into the past." *Regents of University of*

California v. Bakke, 438 U.S. 265, 307 (1978). It simply would justify too many suspect uses of classifications. Similarly in *Croson*, the Court concluded that a claim of social discrimination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" *Croson*, 488 U.S. at 498 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986)). This Court also rejected a social discrimination justification because its use increases the need for classifications. Race-conscious measures necessitate dividing people into racial blocs: victim blocs and oppressor blocs. The beneficiary of a program based on social discrimination cannot point to the specific wrong to highlight the obstacles to his achievement. Instead, the program "only reinforce[s] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298.

2. Sound Policy Reasons Require Preferential Treatment to be Limited in Scope and Duration

a. Group-Rights Theories Present Philosophical Problems at Odds with American Political Tradition

The concept of group rights holds that different cultures are *entitled* to both the preservation of their own culture and a certain share (generally reflecting the group's proportion of the population) of the community's assets. The group rights vision thus posits communal life as a zero-sum game in which groups must contend with one another *as* groups for scarce resources. Individual group members needs' are subordinated to the needs of the group. Nations like Switzerland, Canada, and Lebanon contain some aspects of the group-based model. C. Condit and L. Lucaites, *Crafting Equality: America's Anglo-African Word (Crafting Equality)* at 221 (Univ. of Chicago Press, Chicago 1993). In the United States, this model is evident in government-mandated affirmative action procedures in employment, education, and stipulated public programs, and court-ordered busing of school children across neighborhood district lines. Gordon, *Models of Pluralism: The New American Dilemma*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 178, 183 (1981) (*Pluralsim*). Group-rights advocates postulate a political and economic reward system which gives legitimacy to the standing and stake of various groups in the distributive process. This is reflected in calls for proportional representation in employment, education, legislative bodies and judiciaries. *Id.* at 184.

Group-based rights inevitably devolve into structural separatism. The logic of a system in which group membership plays a large role in educational access, occupational placement, income, political power, and similar matters pressures members of particular groups to stay within the group (so far as practicable) for marriage, friendships, institutional life, and social identity. Rationally, if a significant portion of one's interests are satisfied by emphasis on one's group membership, then one might as well stay within the group's boundaries while enjoying the social comforts of being among "people of one's own kind," where prejudice and discrimination are not present. *Id.* at 185.

On the other hand, in a nation based on individual rights, government does not formally recognize categories of people based on race or ethnicity (or religion or gender or age or disability or sexual preference). It is based on the premise that individuals earn economic and political rewards on the basis of merit and accomplishment. While compassion and the need for basic minimal rewards shore up those truly in need, above this minimal line individual merit prevails. Equality for citizens is defined as equality of opportunity (and equality before the law) but not in terms of results. A nation based on individual rights values the idea of individual meritocracy and the notion that current

generations should not be expected to pay for the sins of their fathers--or at least, those who lived here before them, whether genetically related or not. *Id.* at 187-88. As explored further below, when group-based measures such as forced busing and affirmative action are imposed on a fundamentally individual-rights based society, the measures create backlash and serve as a continuing major irritant in the relationship between individual members of groups.

Given the American emphasis on individual rights over group rights, how do group-rights proponents justify implementation of their theory? Some advocates of black group rights defend their perspective on the grounds that they have experienced unique disadvantages that justify the existence of black group rights although not white group rights. Of course, every group that has cast itself as a victim entitled to preferences will certainly argue that it, too, has suffered unique disadvantages, although some of the more recent "victim groups" (the overweight, the sensitive to fragrances, those with alternative lifestyles) have a more difficult time comparing their perceived or actual hardships with slavery and Jim Crow. In any case, this is a temporary rationale at best. At some point, that debt will have to be declared paid or canceled. Crafting Equality at 221. However, "it is not clear what formulas would be used to measure the designated completion of the process and whether, in fact, these procedures, if left in place for any length of time, would not simply become eventually a permanent part of the national pattern of operation." *Pluralism* at 183-84.

One of the problems of the decision below is that the "independently identifiable group" who loses a statewide initiative campaign cannot show that it has suffered discrimination in the past. Indeed the "group" may exist only in the context of the particular campaign. Political coalitions are often made for convenience and are fleeting once the object of the campaign has been resolved one way or the other. In this case, the People of Colorado chose to reject the "independently identifiable groups" vision based on group-rights theories. Instead, they voted to restrict the ability of new groups to claim a right to the preferences. This choice does not create any constitutional right of action.

b. Group-Rights Theories Present Practical Problems in Their Application

Groups rights permanently pit each group against the others in encounters that are bound to be at least sporadically violent, and which possess the potential for sustained and organized violence such as in India, Northern Ireland, South Africa, Bosnia, and Lebanon. Even here in the United States, the *New York Times* reported several instances of violence related to minorities demanding particular jobs:

> [A] growing number of groups demanding jobs for black and Hispanic workers have been disrupting construction sites in New York City, beating workers and extorting money for labor peace. ... The proliferation of these groups, called minority coalitions, has bred sometimes-violent competition, with members waging intramural gun battles in the fight over turf.

Threats Used to Push Jobs for Minorities, N.Y. TIMES, July 12, 1992, quoted in J. Bovard, *Lost Rights: The Destruction of American Liberty (Lost Rights)* at 194 (St. Martin's Press, N.Y., 1994).

Part of the problem with a group-rights system is that one must determine who belongs in which group. This is a bureaucratic nightmare. Currently in the United States, if individuals are one-eighth black, they are black. If a person's parents' native tongue is Spanish, then he or she is Hispanic--even if he or she is visibly black or, for the most part, English-speaking. *See* Barrett and Zachary, *Budding Backlash? Race, Sex Preferences Could Become Target in*

Voter Shift to Right, WALL ST. J., Jan. 11, 1995, at A1. White males of Spanish descent qualify as protected Hispanics, but whites of Portuguese descent do not. If a bureaucrat decides certain individuals look Asian, then they are. *Id.* With the rate of intermarriage between native-born Asians and those of European descent close to 50%, and for Hispanics about 30%, the whole business of identification reaches almost farcical levels. *Id.; see also* Kristol, *The Tragic Error of Affirmative Action*, WALL ST. J., Aug. 1, 1994, at A14 (bemoaning the "Balkanization of American" where everyone "wants a piece of the affirmative-action pie"); M. Urofsky, *A Conflict of Rights: The Supreme Court and Affirmative Action* at 33 (Charles Scribners' Sons, N.Y., 1991) (quoting Morris Abram, former head of the American Jewish Committee, challenging quotas as an "ethnic spoils system").

The arbitrariness of preferences has been well documented. One might inquire what, exactly, is the basis for special preferences? Skin color? Not always. The term "Hispanics," for example, encompasses both darker Mexican-Americans, and lighter Spaniards. Ramos, *Losers: White Minorities Get Shafted*, NEW REPUBLIC, Oct. 17, 1994, at 24: Historical discrimination? Again, there is no clear connection. It is a given that black Americans suffered discrimination for an abominably long time in our nation's history. But also entitled to special preferences on the basis of color/national origin are Hispanics, Native Americans, and Filipinos. *Id.* Even more interesting are the groups that are excluded. The Bureau of the Census counts Pennsylvania Germans (including Pennsylvania Dutch, Mennonites, and Amish) as a distinct ancestry group. Many of these groups, particularly the Mennonites and Amish, have faced discrimination for their differences and harassment for their pacifism during wartime. *Id.* Pennsylvania Germans also have a lower mean earnings, $10,339 per year, than the regulars on the affirmative action list. The exclusion of the Pennsylvania Germans points out the hypocrisy that inevitably envelops group-based decision making on ethnicity. *Id.*

Those who favor special preferences might argue that they are needed for the economically downtrodden. This does not solve the problem. If Argentines, the highest-paid Hispanic group, receives affirmative action benefits, perhaps the list should include every ethnic category less fortunate than they are. *Id.* at 25. In 1990, Argentines earned $15,956 per year on the job. Less successful were the Dutch, Finns, French, Scotch-Irish, Bulgarians, Croats, Slavic Macedonians, Slovenes, Brazilians, Assyrians, Cajuns, and the Pennsylvania Germans. *Id.* Of course, none of these groups ever makes the list. On the other hand, the Argentine threshold would *disqualify* such frequent list-makers as Pakistanis, Sri Lankans, Burmese, Chinese, Japanese, and Asian Indians, whose earnings average $25,198. *Id.* Preferences granted on any group basis are subject to this arbitrariness.

While group-based preferences have a long history in the field of education (*see Brown v. Board of Education*, 347 U.S. 483 (1954); *Green v. County School Board*, 391 U.S. 430 (1968); Bakke, 438 U.S. 265), various ethnic groups now demand more than simple access to the school of their choice--they have demanded to be taught in the language of their choice. In the 1970s, New Jersey implemented bilingual education to appease the demands of the large and growing Hispanic population. Burke, *Bilingualism/Biculturalism in American Education: An Adventure in Wonderland*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 164, 174 (1981). However, legislation was introduced in 1980 to repeal the law. The reason: After Spanish bilingual education was instituted and upheld in the courts, other ethnic groups demanded bilingual education, too. *Id.* This led to the nearly impossible task of trying to teach in the

following 10 languages: Spanish, Portuguese, Japanese, Haitian/French, Arabic, Vietnamese, Tagalog, Greek, Russian, and Korean. *Id.*

Problems also arise in contexts other than ethnicity and race. The recent excesses of the Americans with Disabilities Act, aptly demonstrate the how quickly individuals will jump on a slippery slope. For example, in Marin County, California, members of a group demanded that the county ban the use of perfume, cologne, aftershave, and hairspray in county buildings because they shared a "debilitating sensitivity to fragrances." Lost Rights at 186. In Fort Worth, Texas, a woman with cystic fibrosis sued a nightclub for discrimination because it did not ban all smoking on its premises as a "reasonable accommodation" for her special needs. *Id.* at 186-87. Even worse is the inclusion of individuals with infectious diseases as "disabled," and now entitled to special preferences. In the past, a person with a contagious disease bore the burden of proof to show that he or she was not a public health threat to work in a restaurant. Now a restaurant owner must prove that a contagious individual would pose a direct and substantial threat. *Id.* at 189. Thus, "[c]ivil rights law has gone from letting black people sit at luncheon counters to entitling people with infectious diseases to prepare and serve them lunch." *Id.*

As these examples have demonstrated, what may begin as a simple antidiscrimination statute inserts group-rights theories into the law with these inevitable results. Including sexual orientation in a discrimination statute can easily lead to regarding homosexuality as a positive source of human rights, entitled to affirmative action or preferential treatment hiring practices. The People of Colorado, already complying with the demands of racial, ethnic, gender, and other groups, decided to draw the line by denying special protections to a group (homosexuals and bisexuals) who do not have federal protections but who are not politically powerless.

B. States May Choose to Further Integration over Structural Separatism in Its Statewide Policies

From 1865-1965, the chief objectives of the civil rights movement were to integrate public accommodations and to eliminate black disfranchisement. Wilson, *The Black Community in the 1980s: Questions of Race, Class, and Public Policy*, 454 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 26, 27 (1981). Dr. Martin Luther King, Jr., spoke out against the separatism which results from pitting groups against one another:

> We do not have to look very far to see the pernicious effects of a desegregated society that is not integrated. It leads to "physical proximity without spiritual affinity." It gives us a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart .... It leaves us with a stagnant equality of sameness rather than a constructive equality of oneness.

King, Jr., *The Ethical Demands for Integration* (Dec. 27, 1962), in Washington, ed., *A Testament of Hope: the Essential Writings of Martin Luther King, Jr.*, at 118 (Harper and Row, S.F., 1986); Crafting Equality at 192.

However, after some experience with federal government support programs, the new civil rights establishment endorsed special preferences, arguing that to overcome both the legacy of "separate but equal" and current discriminatory practices, they needed special protection. *See* J. Jackson, *Straight from the Heart* at 322 (Fortress Press, Phila. 1987); Crafting Equality at 191. This advocacy of preference requires the repudiation of both the goals of color-blind justice and integration. It also requires group members

to maintain at least enough racial separation to perpetuate a stable group identity. Crafting Equality at 191.

Thus, group-based entitlements are inherently undemocratic. On the other hand,

> in opting for integration, a citizen denies his or her impulse to use our most arbitrary characteristics--race, ethnicity, gender, sexual preference--as the basis for identity, as a key to status, or for claims to entitlement. ... [I]ntegration [is] the inclusion of all citizens into the same sphere of rights, the same range of opportunities and possibilities that our Founding Fathers themselves enjoyed. Integration is not social engineering or group entitlements, it is a fundamental *absence* of arbitrary barriers to freedom. ... Anything that pushes anybody out of this sphere is undemocratic and must be checked, no matter the good intentions that seem to justify it.

Steele, *The New Sovereignty*, HARPER'S (July, 1992), *reprinted in* C. Cozic, ed., *Civil Liberties: Opposing Viewpoints* at 201, 206-07 (1994). The State of Colorado has chosen to promote the route of integration, rather than separatism. The People of Colorado, by statewide direct vote, chose to draw the line on group-based preferences. This Court should uphold their choice.

CONCLUSION

"Risks must be taken for genuine civil rights. But the kinds of internal struggles that have torn other multiethnic societies apart must be for something more than the continuing visibility of organizations or the continued employment of the their lawyers." Rhetoric or Reality at 118. The People of Colorado have chosen to place individual rights above group rights, consistent with the American tradition. No newly created "fundamental right," ill-defined and overbroad, should deny to Colorado the right to make statewide policy decisions relating to special preferences. For the reasons set forth above, Pacific Legal Foundation urges this Court to reverse the decision below.

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